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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	MM DOCKET NO. 93-135
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BRH-890601VB
)	
For renewal of Station WSWR(FM))	
Shelby, OH)	
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BTCH-921019HX
)	File No. BTCH-921019HY
For transfer of control of Station)	
WSWR(FM), Shelby, OH)	

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TO: The Commission

APPLICATION FOR REVIEW

Pursuant to §§ 1.115 and 1.4(b) of the Commission's Rules, The Petroleum V. Nasby Corporation (Nasby), licensee of Station WSWR(FM) at Shelby, Ohio, by its counsel, hereby seeks review of the Review Board's *Decision*, 10 FCC Rcd. 6029 (Rev. Bd. 1995), FCC 95R-11, released June 5, 1995, and the Review Board's *Memorandum Opinion and Order (MO&O)*, FCC 95R-17, released September 13, 1995 (slip opinion), in the above-referenced proceeding.

Background

This proceeding involves the applications of Nasby for renewal of license of Station WSWR(FM), Shelby, Ohio and for *nunc pro tunc* approval of the transfer of control of Station WSWR(FM). The renewal application was designated in order to determine the effect, if any, the criminal convictions of Thomas L. Root, has on Nasby's qualifications to remain a Commission licensee. In its *Decision & MO&O*, the Review Board affirmed the renewal of Station WSWR(FM), which renewal was previously granted by the Honorable Edward Luton (presiding ALJ) in an *Initial Decision of Administrative Law Judge Edward Luton*, 9 FCC Rcd. 6072 (ALJ 1994) (*I.D.*) and granted the applications for transfer of control of

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Station WSWR(FM). The Review Board, however, conditioned its affirmance of the renewal of Station WSWR's license by affixing a specific divestiture condition to the approval of the renewal and transfer of control applications. *Decision*, ¶ 3, 10 FCC Rcd. at 6029; *MO&O*, ¶ 5, *slip op.* at 2. The Board's ordered (1) that the stock held individually by Kathy G. Root (33 shares) and the stock held in trust for the benefit of Thomas L. and Kathy G. Root's children (150 shares) be divested within 60 days from the release of the *Decision* [later extended to a period of six months in connection with an interim trust arrangement from the release of the *MO&O*] to "unrelated buyers" [or under the *MO&O*, transferred to the corporate treasury until a suitable buyer is located]; (2) that the 70.25 shares of stock held by Joanne L. and Thomas F. Root, JTWROS, which is the subject of the proposed transfer to Ginsburg, Feldman & Bress, Chartered, be divested within 60 days from the release of the *Decision* to "unrelated buyers;"¹ and (3) that Joanne L. Root resign her membership on the Nasby Board and her position as corporate Secretary of Nasby, also within 60 days of the release of the *Decision*. *Decision*, ¶ 25-26, 10 FCC Rcd. at 6033; *MO&O*, ¶ 7, *slip op.* at 2. The Board stated that this action was necessary to "provide the Commission with adequate assurance that WSWR(FM) will not again be subjected to public scrutiny to determine the potential impact of Mr. Root's presence." *Decision*, ¶ 24, 10 FCC

¹ Nasby does not seek Commission review of this aspect of the Board's proposed forced divestiture inasmuch as Nasby itself sought Commission consent to the proposed transfer of these shares to Ginsburg, Feldman & Bress Chartered by virtue of its filing a transfer of control application which was assigned FCC File No. BTCH-921019HY. Nor does Nasby seek review of the Board's order (at ¶ 27, 10 FCC Rcd. at 6033) of forfeiture in the sum of \$4,000.00.

Rcd. at 6033; see also *MO&O*, ¶ 5, *slip op.* at 2 ("divestiture . . . most suitable means of providing WSWR(FM) with an independent future untainted by its unfortunate association with Mr. Root.").

Questions Presented for Review. The questions presented for review are whether the Board's order of divestiture of the stock held by Kathy G. Root, individually and of the Root minor children in Nasby and the order of divestiture of Joanne L. Root of her officer and director positions with Nasby is substantially supported by the evidence and whether such orders of divestiture are arbitrary and capricious.

Argument. Proposed Stock Divestiture of Kathy G. Root and Root minor children. In its *Decision*, the Board stated that it was not embarking on a *sua sponte* review of the presiding ALJ's determination that the stock transfers which are the subject of the transfer of control applications were not accompanied by misrepresentation, and therefore did not require the removal of Nasby's license. *Decision*, ¶ 22, 10 FCC Rcd. at 6032. Yet, the Board appears to have, *sua sponte*, done precisely that. The Board acknowledged that neither the Bureau nor Nasby took exception to the *I.D.* (*Id.*) nor did the Bureau challenge the record evidence on this score. The Board nonetheless imposed certain conditions on Nasby's license renewal, notwithstanding its determination that Nasby is qualified to remain a Commission licensee. It apparently did so because it believed that the stock transfers facilitated the removal of Thomas L. Root from ownership in Nasby by transferring the stock to family members, which apparently in the Board's view, would permit Thomas L. Root to have potential influence in connection with these shares. *Id.*; *MO&O*, ¶ 5, *slip op.* at 2.

The record evidence, which was not challenged by the Bureau and remains uncontroverted, reflects that in December 1986 (several years prior to Thomas L. Root's criminal convictions in unrelated matters to Station WSWR(FM)), trusts were established for two of the three minor children of Thomas L. and Kathy G. Root. Upon the birth of a third child -- in December 1987 -- a third trust was to be established in 1988 in order to "even things up" for all three children relative to their respective stock ownership in Nasby. PVN Ex. 4, p. 1 (Testimony of Kathy G. Root). The Roots did not get around to "evening things up" until after the purchase of additional Nasby stock by Thomas L. Root from two former Nasby shareholders and through a preemptive rights stock purchase, both of which occurred in 1989. *Id.* According to Kathy G. Root, the transfers to the minor children were so structured so as to permit the stock transfers without exceeding the \$10,000 per donee per annum gift tax ceiling, taking into consideration the fair market value of Nasby stock -- at the time -- \$400 per share. *Id.* There is no record evidence which supports the Board's apparent concern that the stock transfers facilitated Thomas L. Root's removal or that because the transfers involved members of his immediate family, the potential of influence by Thomas L. Root exists. Indeed, after all that Nasby and its shareholders have been through in defending its two most valuable assets -- its Station license and its reputation in the community -- it is incomprehensible that Nasby and its shareholders would find themselves in a position to be influenced by Thomas L. Root. Nasby did not voluntarily place itself in its current status before the FCC and common sense dictates that it will not subject the Station to any potential or

actual influence from Thomas L. Root.

Moreover, the Board's divestiture order places undue hardship on Nasby and its shareholders. As the record evidence established, Station WSWR(FM) is a 3 kw FM radio station in Shelby, Ohio, which has been a marginal operation at best. PVN Ex. 1, p. 1; PVN Appendix C (Income and Balance Statements). It is not in a financial position to purchase the stock, and there is no secondary market in which to sell less than controlling interest in a station the size of WSWR(FM). This is not an FM radio station located in New York City where the cash flow may be such that individuals exist who may be interested in purchasing less than a controlling interest. Moreover, even assuming that prospective purchasers of the stock can be located, a limited duration in which to sell the stock is tantamount to a forced sale of the entire small market FM radio station under conditions which are not in the station's best interest, even assuming the other Nasby shareholders were interested and could in fact locate a suitable buyer. Factoring in the time to attempt to locate a suitable buyer, negotiating such sale, drafting and execution of appropriate sales documents, then seeking FCC approval, runs Nasby smack into its next renewal period. Moreover, Nasby and its Station have expended considerable resources to retain its qualifications to remain a Commission licensee and have been found by the presiding ALJ and Board to possess the requisite qualifications. A forced "fire" sale is not the reward it deserves following prolonged scrutiny in the course of a hearing proceeding on matters pertaining to the conduct of a former shareholder in circumstances which did not involve the Station in any way and which occurred in matters beyond its

control.

Notwithstanding that the record evidence fully supports Station WSWR's unconditional license renewal -- a determination reached by the presiding ALJ -- Nasby petitioned the Board to reconsider its divestiture requirement in its *Decision* and consider instead the establishment of a trust to hold title to the shares of stock currently held by Kathy G. Root individually, and in trust for her children, and the appointment of an independent trustee, in an effort to bring this proceeding to an earlier conclusion and to conserve the resources of the Commission and Nasby. Nasby attached as Appendix A to its petition a Statement of Intent to Form a New Trust to Hold Title to Certain Shares of Stock in the Petroleum V. Nasby Corporation executed by Kathy G. Root, individually and as Custodian under the Uniform Gift to Minors Act (UGMA), and Arlene M. Geer, Trustee. The Statement provides that a new trust would be formed which would place control of the trust (which would include all the Nasby stock shares at issue) **irrevocably** in the hands of an independent trustee. All legal voting control would be placed in the independent trustee, consistent with Commission rules and policies which encourage the facilitation of trusts. *In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Corporate Attribution Order)*, 55 R.R.2d 1465, 1485-86 (1984), recon. in part, 58 R.R.2d 604 (1985). The Statement further indicates that the trust would include all other safeguards established by the Commission (see *Corporate Attribution Order*, *supra*), including, *inter alia*, that no beneficiary and no other person will be empowered to replace the trustee or direct the trustee in the discharge of his duties, the trustee will be

prohibited from selling the stock to any beneficiary, to Thomas L. Root, or to any member of his family, the trustee will be prohibited from providing any information to any beneficiary relating to the operation, management or financial condition of Nasby, and the like.

Moreover, the trust would be prepared for submission as an amendment or modification to the existing transfer of control application File No. BTCH-921019HX, and would be subject to the review and approval of the Mass Media Bureau as directed by the Board at fn. 12 of its *Decision* (10 FCC Rcd. at 6033).² This option is one Nasby continues to be agreeable and believes it is an option considerably less draconian than the Board's divestiture order. Once again, while divestiture of the stock held by Kathy G. Root in her own right and on behalf of the Root minor children, should not be required as a matter of law, Nasby would be agreeable to the trust arrangement (without any limitation on the duration of its ownership interest in Nasby). Nasby believes that this trust arrangement sufficiently satisfies the Board's apparent intent -- to eliminate any potential presence of Thomas L. Root. See, e.g., *MO&O*, ¶ 7, *slip op.* at 2 (" . . . proposed trust arrangement . . . is designed to remove the possibility that Mr. Root could influence the voting of the shares"). Transfer of the stock (or a sale of the assets of the station) at a later date, not under a

² If the Commission favorably considers Nasby's alternative to divestiture as proposed by the Board, it is requested that the Commission permit the modification of the first transfer of control application (File No. BTCH-921019HX) without the need of assigning a new file number. Nasby understands that the Mass Media Bureau may require that the proposed modification be placed on public notice for comment relative to Mr. Stoll's qualifications to serve as a trustee.

"cloud" and subject to the provisions of the trust and prior Commission approval will provide a more orderly and efficient means of such transfer or sale of the assets of the station, if desired by Nasby or its shareholders.

Forced divestiture of Joanne L. Root's membership on the Nasby Board of Directors and as Nasby's corporate Secretary

At ¶ 24 (10 FCC Rcd. at 6033) of its *Decision* and at ¶ 7 (*slip op.* at 2) of its *MO&O*, the Board seeks to enforce the resignation of Joanne L. Root, mother of Thomas L. Root, as a member of the three-person Nasby Board and as corporate Secretary of Nasby. The Board's decision is apparently based on its characterization that Joanne L. Root "succeeded" Thomas L. Root to these positions, and its further implication that this "succession" necessarily arouses suspicion concerning "the potential impact of Mr. Root's presence." *Id.* While it is true that Joanne L. Root was elected to serve as a member of the Nasby Board and as corporate Secretary of Nasby subsequent to Thomas L. Root's resignation, there is no evidence in the record to support the Board's view and correspondent negative implication that Joanne L. Root succeeded Thomas L. Root as a member of the Board and as corporate Secretary in anything but a duly authorized election in which Thomas L. Root took no part.

Nor is there is any evidence, record or otherwise, that Joanne L. Root's election to the Nasby Board and as the corporate Secretary of Nasby was so that the interests of Thomas L. Root, conceivably advanced by virtue of his children's beneficial stock ownership and his spouse's stock ownership, would take precedence

over the interests of the numerous other Nasby shareholders.³

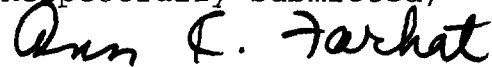
Joanne L. Root has been a shareholder of Nasby since its inception over 12 years ago when the station commenced operations and if the other Nasby shareholders, most of whom live in the several communities Station WSWR(FM) serves, have placed their trust and confidence in Joanne L. Root to act in their best interests, it is arbitrary and capricious for the Board to substitute its judgment and conclude that the forced resignations will somehow provide "adequate assurance that WSWR(FM) will not again be subjected to public scrutiny to determine the potential

³ The Board appears to presume that Joanne L. Root, as the mother of Thomas L. Root, was, or is, predisposed to place his interests above all other Nasby shareholders, or is legally incapable of resisting any potential for influence by him relative to her positions with Nasby. This is unsupported by the record evidence. Thomas L. Root is an adult who engaged in misconduct for which he exclusively was punished. Thomas L. Root's misconduct is a matter of record in this proceeding and such misconduct did not in any way implicate the Station or Nasby officers, directors or shareholders, including Joanne L. Root. If it did, the presiding ALJ and the Board would have no doubt taken this into consideration before it determined that Nasby was qualified to remain a Commission licensee. See, e.g., *Decision*, ¶¶ 18-19, 10 FCC Rcd. at 6031-32. Indeed, even under the Commission's own attribution rules, the Commission looks to the specific facts and circumstances presented in reaching a determination that there is the requisite degree of independence in the interests of family members. *Spousal Attribution Policy*, 70 R.R.2d 768, 771 (¶ 16) (1992). Here, the Commission and the Bureau at the outset have been aware that Joanne L. Root is the mother of Thomas L. Root. The Bureau served numerous interrogatories and document requests on Nasby. It declined, however, to take depositions of any Nasby principals -- including Joanne L. Root -- despite the undersigned's offer to make the principals available. If there was a concern that Joanne L. Root was not acting in a proper manner, the Bureau could have pursued this matter in discovery and at hearing. It did not and the time for such opportunity has long passed. In the absence of any evidence, record or otherwise, it is arbitrary and capricious for the Board to substitute its own unfounded speculation that Joanne L. Root, as the mother of Thomas L. Root, has not or cannot as a matter of fact and law act independently and responsibly in the fiduciary duties she owes to all Nasby shareholders.

impact of Mr. Root's presence." The fact is the record evidence already establishes that from its inception, Station WSWR(FM)'s day-to-day management, operation and control has always and continues to rest with the station's General Manager, first David L. Williamson, and since November 1988, Timothy J. Moore. *Decision*, ¶ 19, 10 FCC Rcd. at 6032. The Board's calling for the forced resignations of Joanne L. Root implies wrongdoing on her part which is not supported by the record or otherwise.⁴

Conclusion. For the reasons stated above, The Petroleum V. Nasby Corporation respectfully requests that the Commission grant review and modify the Review Board's *Decision* and MO&O released in this proceeding as requested by Nasby herein, with the ultimate determination of an unconditional renewal of Station WSWR(FM) for the full license term.

Respectfully submitted,



Ann C. Farhat

Bechtel & Cole Chartered
1901 L Street, N.W., Suite 250
Washington, D.C. 20036
202/833-4190

Counsel for The Petroleum
V. Nasby Corporation

October 13, 1995

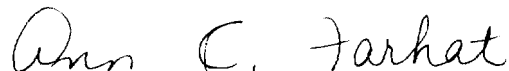
⁴ This conclusion is further illustrated by the Board's own acknowledgement that the stock interests held by Joanne L. Root and her spouse, Thomas F. Root, are not affected by its *Decision*. See *Decision*, fn. 11, 10 FCC Rcd. at 6033. If Joanne L. Root's stock interests in a qualified Commission licensee remain unaffected by the Board's *Decision* there is absolutely no basis to restrict Nasby shareholders from determining that Joanne L. Root has the requisite qualifications to serve as an officer and director of Nasby.

CERTIFICATE OF SERVICE

Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on the 13th day of October, 1995, she caused copies of the foregoing Application for Review to be served by hand or by U.S. first class mail, postage prepaid, on the following individuals:

John I. Riffer, Esquire (by hand)
Associate General Counsel-
Adjudication
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

James W. Shook, Esquire (by first class mail)
Federal Communications Commission
Mass Media Bureau
2025 M Street, N.W.
Room 8210
Washington, D.C. 20554


Ann C. Farhat